WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

II. The Present Condition of the Authorities.

[*Continued.*]

Michigan.

IN most of the cases the place of making and of performance was the same, and that law was held to govern;[1] but in a few cases the place of contracting and of performance were different, and in these cases the court has held that the law of the place of performance necessarily applies.[2]

In the case of contracts attacked as usurious, however, the court applies the law of the place intended by the parties; being guided, it would seem, largely by the residence of the debtor, the *situs* of the security and the supposed desire of the parties that their transaction should be a legal one.[3]

But in a case where a note was made in Michigan on Sunday, payable in Ohio, it was held void according to the Michigan Sun-

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[1] Bissell *v.* Lewis, 4 Mich. 450; Collins Iron Co. *v.* Burkane, 10 Mich. 283; Clay F. & M. I. Co. *v.* Huron S. & L. M. Co., 31 Mich. 346; O'Rourke *v.* O'Rourke, 43 Mich. 58; Voorhies *v.* Peoples' M. B. Soc., 91 Mich. 469; Dawson *v.* Peterson, 110 Mich. 431; John A. Tolman Co. *v.* Reed, 115 Mich. 71; Palmer *v.* Hill, 140 Mich. 468; Stack *v.* Detour L. & C. Co., 151 Mich. 21; Dolan *v.* Supreme Council, 152 Mich. 266.

[2] Strawberry Point Bank *v.* Lee, 117 Mich. 122; Barger *v.* Farnham, 130 Mich. 487; Douglass *v.* Paine, 141 Mich. 485. In the last case the court said: "The rule that a contract is to be interpreted according to the law of the place where it is made is subject to the exception that, if by the terms or nature of the contract it appears that it was to be executed in another country then the place of making the contract becomes immaterial, and the law of the place where the contract is to be performed governs, in determining the rights of the parties, and if a contract is made in one state or country, and according to its terms is to be performed in another, it will be presumed that it was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and effect of the contract."

[3] Mott *v.* Rowland, 85 Mich. 561 ("the parties had an undoubted right to adopt the laws of either state, provided they did so in good faith"). Nat. M. B. & L. Assoc. *v.* Burch, 124 Mich. 57; Hoskins *v.* Rochester S. & L. Assoc., 133 Mich. 505; Cobe *v.* Summers, 143 Mich. 117.

day law; the court saying that "parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state." [1]

Minnesota.

The question has seldom arisen in this state. In case of a shipment of goods by carrier from Illinois to Minnesota it was assumed without argument that the law of Illinois applied to the contract of carriage.[2] And a contract for the sale of land in Colorado, which was made in Minnesota and provided for payments in the latter state, was held to be governed by the law of Minnesota, as the *lex loci contractus*, and not by the *lex rei sitae*.[3]

Mississippi.

In cases where the contract was both made and to be performed in a foreign state, the law of that state of course governs.[4] Where the place of performance differs from the place of making, the law of the place of performance has usually been applied.[5] In the usury cases, however, this has been explained as due to the presumed intention of the parties; and where the application of the law of the place of making would enable the court to uphold the contract, that law has been adopted as the law intended.[6]

On the other hand, the law of the place of making has been applied without much consideration in one or two cases. Thus in case of a telegram sent from Massachusetts to Mississippi the law of Massachusetts was held to govern the legality of a limitation of liability; [7] and in case of a contract of sale made in Mississippi it was held that

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[1] Arbuckle *v.* Reaume, 96 Mich. 243.

[2] Powers M. Co. *v.* Wells, 93 Minn. 143.

[3] Finnes *v.* Selover, 102 Minn. 334.

[4] Ivey *v.* Lalland, 42 Miss. 444; Partee *v.* Silliman, 44 Miss. 272; Allen *v.* Bratton, 47 Miss. 119; McKee *v.* Jones, 67 Miss. 405; Hart *v.* Livermore F. & M. Co., 72 Miss. 809; Ætna Ins. Co. *v.* Mount, 45 So. 835.

[5] Martin *v.* Martin, 1 Sm. & M. 176; Emanuel *v.* White, 34 Miss. 56; Coffman *v.* Bank of Kentucky, 41 Miss. 212; Harrison *v.* Pike, 48 Miss. 46; Lienkauf B. Co. *v.* Haney, 46 So. 625. All these cases except the first arose on commercial paper.

[6] Brown *v.* Freeland, 34 Miss. 181; Shannon *v.* Georgia S. B. & L. Assoc., 78 Miss. 955. But see Brown *v.* Nevitt, 27 Miss. 801, where the Mississippi law was applied to make void for usury a bill discounted in Mississippi.

[7] Shaw *v.* Postal T. C. Co., 79 Miss. 670.

the Mississippi Sunday law applied.[1] A policy of insurance made in another state upon property in Mississippi was held not subject to the Mississippi law,[2] though an express provision of statute that all contracts of insurance on Mississippi property should be construed according to Mississippi law was of course enforced by the Mississippi court.[3]

Missouri.

When the contract is made and to be performed in the same state, the contract is governed by the law of that state; and this is usually put on the ground that the law of the place of making governs.[4] And in many cases where the contract was made in one state and performable in another,[5] or made in one state and relating closely to another,[6] the law of the place of making has been applied. In a few cases this has been said to be the rule "ordinarily," [7] or "unless the parties have in view some other law;" [8] but in other cases it is distinctly adopted as an absolute rule,[9] and in several cases where

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[1] Strouse *v.* Lanctot, 27 So. 606.

[2] Swing *v.* Brister, 87 Miss. 516.

[3] Fidelity M. L. I. Co. *v.* Miazza, 46 So. 817.

[4] Harley *v.* Stapleton, 24 Mo. 248; Golson *v.* Ebert, 52 Mo. 260; Stix *v.* Mathews, 63 Mo. 371, 75 Mo. 96; Johnston *v.* Gawtry, 83 Mo. 339; Thompson *v.* Traders' Ins. Co., 169 Mo. 12; Tri-State A. Co. *v.* Forest Park H. A. Co., 192 Mo. 404; Merchants & M. I. Co. *v.* Linchey, 3 Mo. App. 587; Creston Nat. Bank *v.* Salmon, 117 Mo. App. 506; Standard Leather Co. *v.* Mercantile T. M. I. Co., 131 Mo. App. 701; Tennent *v.* Union C. L. I. Co., 133 Mo. App. 345; Roberts *v.* Modern Woodmen, 133 Mo. App. 207. Where there is nothing to show where contract was made, the law of the forum is applied. Flato *v.* Mulhall, 72 Mo. 522.

[5] *Contracts of Carriage, etc.*: Otis Co. *v.* Missouri P. Ry., 112 Mo. 622; Reed *v.* Western U. T. Co., 135 Mo. 661; Hartmann *v.* Louisville & N. R. R., 39 Mo. App. 88; Crouch *v.* Louisville & N. R. R., 42 Mo. App. 248; Nenno *v.* Chicago R. I. & P. R. R., 105 Mo. App. 540; Townsend & W. D. G. Co. *v.* U. S. Exp. Co., 133 Mo. App. 683.

Contracts of Sale: Houghtaling *v.* Ball, 19 Mo. 84; Edwards B. Co. *v.* Stevenson, 160 Mo. 516; Kerwin *v.* Doran, 29 Mo. App. 397.

Commercial Paper: F. B. Hauck Clothing Co. *v.* Sharpe, 83 Mo. App. 385; Phœnix M. L. I. Co. *v.* Simons, 52 Mo. App. 357.

[6] *Insurance Contracts:* Daggs *v.* Orient I. Co., 136 Mo. 382; Burridge *v.* New York L. I. Co., 211 Mo. 158; Whittaker *v.* Mutual L. I. Co., 133 Mo. App. 664.

Sale of Lottery Tickets: Roselle *v.* Farmers' Bank, 141 Mo. 36.

[7] Reed *v.* Western U. T. Co., 135 Mo. 661.

[8] Otis Co. *v.* Missouri P. Ry., 112 Mo. 622.

[9] Hartmann *v.* Louisville & N. R. R., 39 Mo. App. 88; F. B. Hauck Clothing Co. *v.* Sharpe, 83 Mo. App. 385.

the parties provided in their agreement that the contract should be governed by another law, the court held that this could not be done.[1]

In the usury cases, however, the court appears (without citing the Missouri authorities just examined) to have held that the law of the place of performance governs,[2] subject however to the limitation that if the parties intended another law it will govern, and to the presumption that they intended the law that would make the contract valid.[3]

Nebraska.

The law of the place of making has usually been applied to the validity of a contract.[4] But it appears to be the accepted doctrine that the parties may if they choose adopt in good faith the law of either the place of making or that of performance,[5] and in one case the latter law was on that ground held to govern the question of usury.[6]

New Hampshire.

Where no place of performance different from the place of making is agreed upon, the contract is to be governed by the law of the place of making,[7] but where the parties agree on a place of performance, the court has held that the law of that place is to be applied.[8] Even in cases (like contracts of carriage) where the performance is

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[1] Cravens *v.* New York L. I. Co., 148 Mo. 583; Horton *v.* New York L. I. Co., 151 Mo. 604; Nichols *v.* Mutual L. I. Co., 176 Mo. 355; Summers *v.* Fidelity M. A. Assoc., 84 Mo. App. 605.

[2] Trower Bros. Co. *v.* Hamilton, 179 Mo. 205; Central N. Bank *v.* Cooper, 85 Mo. App. 383.

[3] Davis *v.* Tandy, 107 Mo. App. 437.

[4] Sands *v.* Smith, 1 Neb. 108; Olmstead *v.* N. E. Mtg. Co., 11 Neb. 493; Joslin *v.* Miller, 14 Neb. 91; Tredway *v.* Riley, 32 Neb. 495; Bascom *v.* Zediker, 48 Neb. 380; Antes *v.* State Ins. Co., 61 Neb. 55; Peoples' B. L. & S. A. *v.* Shaffer, 63 Neb. 573; National M. B. & L. Assoc. *v.* Retzman, 69 Neb. 667; Corn Exchange N. Bank *v.* Jansen, 70 Neb. 579.

[5] Security Co. *v.* Eyer, 36 Neb. 507.

[6] Coad *v.* Home Cattle Co., 32 Neb. 761.

[7] *Commercial Paper:* Day *v.* Rowell, 12 N. H. 49; Watriss *v.* Pierce, 32 N. H. 560; Howard *v.* Fletcher, 59 N. H. 151; Fessenden *v.* Taft, 65 N. H. 39; New York L. I. Co. *v.* McKellar, 68 N. H. 326.

Policy of Insurance: Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291.

Sale: Smith *v.* Godfrey, 28 N. H. 379; Bliss *v.* Brainard, 41 N. H. 256; Hill *v.* Spear, 50 N. H. 253; Lauten *v.* Rowan, 59 N. H. 215.

[8] Thayer *v.* Elliott, 16 N. H. 102; Hall *v.* Costello, 48 N. H. 176; Davis *v.* Ætna M. F. I. Co., 67 N. H. 218; Limerick Nat. Bank *v.* Howard, 71 N. H. 13.

to take place in two states, the court applies the law of that state in which the performance was taking place at the time of the breach in question.[1] In one usury case the right of the parties to choose either law was recognized.[2]

In the latest case, however, without fully arguing the question and without referring to the earlier authorities, the court held that so far as the nature and validity of a contract is concerned it is governed by the law of the place of making.[3]

New Jersey.

Where no separate place of performance is named, or where the place of making and of performance are the same, the law of that place governs.[4] In a few cases the doctrine that where the places differ the law of the place of making governs appears to be accepted;[5] but the prevailing doctrine is that the law of the place of performance governs the nature and validity of the obligation.[6]

New York.

Where a contract is expressly performable in the place where it is made, it is of course governed by the law of that place;[7] and the same is true where no place of performance is expressly named.[8]

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[1] Barter *v.* Wheeler, 49 N. H. 9; Gray *v.* Jackson, 51 N. H. 9.

[2] Townsend *v.* Riley, 46 N. H. 300.

[3] Seely *v.* Manhattan L. I. Co., 72 N. H. 49.

[4] Bradley *v.* Johnson, 46 N. J. L. 271; Watson *v.* Lane, 52 N. J. L. 550; Roubicek *v.* Haddad, 67 N. J. L. 522; Allegheny Co. *v.* Allen, 69 N. J. L. 270; Orient Ins. Co. *v.* Rudolph, 61 Atl. 26; Irving N. Bank *v.* Ellis, 64 Atl. 1071; Knoup *v.* Carver, 70 Atl. 660.

[5] Columbia Ins. Co. *v.* Kinyon, 37 N. J. L. 33; Atwater *v.* Walker, 16 N. J. Eq. (1 C. E. Green) 42.

[6] Ball *v.* Consolidated F. Co., 32 N. J. L. 102; Campbell *v.* Nichols, 33 N. J. L. 81; Freese *v.* Brownell, 35 N. J. L. 285 (all cases of commercial paper).

[7] Thatcher *v.* Morris, 11 N. Y. 437; Cutler *v.* Wright, 22 N. Y. 472; Herdie *v.* Roessler, 109 N. Y. 127; Hutchinson *v.* Ward, 192 N. Y. 375; Hodges *v.* Shuler, 24 Barb. 68; Backman *v.* Jenks, 55 Barb. 468; Merchants' Bank *v.* Brown, 86 App. Div. 599; Parsons *v.* Teller, 111 App. Div. 637; Whitman *v.* Connor, 40 N. Y. Super. 339; Heidenheimer *v.* Mayer, 42 N. Y. Super. 506; Scott *v.* Pilkington, 15 Abb. Pr. 280; Merchants' Bank *v.* Southwick, 67 How. Pr. 324; Simpson *v.* Hefter, 42 Misc. 482.

[8] Barry *v.* Equitable L. A. Soc., 59 N. Y. 587; Merchants' Bank *v.* Griswold, 72 N. Y. 472; Bath Gaslight Co. *v.* Rowland, 178 N. Y. 631 (affirming 84 App. Div. 563); Merchants' Bank *v.* Spaulding, 12 Barb. 302; Pomeroy *v.* Ainsworth, 22 Barb. 118;

In only a few such cases was the question raised whether the law of one place or the other should govern.[1]

Where the place of contracting and of performance are different, the decisions are in great confusion. In several cases the law of the place of making has been applied;[2] in other cases, the law of the place of performance governs.[3] But the doctrine which is probably the prevailing one to-day is that the intention of the parties, so far as it is disclosed, must control.[4] This doctrine appears first to have been applied in usury cases, where it was held that the parties might choose the law either of the place of contracting or of the place of payment;[5] but the present rule seems to be that the law of

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Artisans' Bank *v.* Park Bank, 41 Barb. 599; Richardson *v.* Draper, 23 Hun 188; Western M. M. F. I. Co. *v.* Hilton, 42 App. Div. 52; Amsick *v.* Rogers, 103 App. Div. 428; Manhattan L. I. Co. *v.* Johnson, 115 App. Div. 429; Pool *v.* New Eng. M. L. I. Co., 123 App. Div. 885; Swing *v.* Dayton, 124 App. Div. 58; Penox *v.* United Ins. Co., 3 Johns. Cas. 178; Chapman *v.* Robertson, 6 Paige 627; Waldron *v.* Ritchings, 9 Abb. Pr. N. S. 359; Ball *v.* Davis, 1 N. Y. St. R. 517.

[1] In Western T. & C. Co. *v.* Kilderhouse, 87 N. Y. 430, the court spoke of "the general rule of law," which makes the validity of a contract depend upon the law of the place in which it was made; and in Northrup *v.* Foot, 14 Wend. 248, the court asserted that a contract void by the law of the place of contracting could not be enforced anywhere. In Milhouse *v.* Johnson, 21 N. Y. St. R. 382, the court held that the assignability of a contract depended on the law of the place of making.

[2] Wayne C. S. Bank *v.* Low, 81 N. Y. 566 (explaining Jewell *v.* Wright, 30 N. Y. 259, and Dickinson *v.* Edwards, 77 N. Y. 573); Staples *v.* Nott, 128 N. Y. 403; China M. I. Co. *v.* Force, 142 N. Y. 90 (citing however with approval a passage from Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S. 397, in which the doctrine is limited to cases where the parties do not clearly manifest another intention); Colonial Nat. Bank *v.* Duerr, 108 App. Div. 215; Daniels *v.* Rogers, 108 App. Div. 338; Hooley *v.* Talcott, 129 App. Div. 233; Le Baron *v.* Van Brunt, 9 Daly 349; Barnes *v.* Long Island R. R., 47 Misc. 318.

[3] Everett *v.* Vendryes, 19 N. Y. 436; Jewell *v.* Wright, 30 N. Y. 259; Curtis *v.* Delaware, L. & W. R. R., 74 N. Y. 116; Dickinson *v.* Edwards, 77 N. Y. 578; Williams *v.* Central R. R., 183 N. Y. 518, affirming 93 App. Div. 582; Manhattan L. I. Co. *v.* Johnson, 188 N. Y. 108; Thompson *v.* Ketcham, 4 Johns. 285, 8 Johns. 189; Kentucky *v.* Bassford, 6 Hill 526; Abell *v.* Douglass, 4 Den. 305; Hosford *v.* Nichols, 1 Paige 220; Potter *v.* Tallman, 35 Barb. 182; Bright *v.* Judson, 47 Barb. 29; Hildreth *v.* Shepard, 65 Barb. 265. In Hyde *v.* Goodnow, 3 N. Y. 266, the court said that this rule does not apply where the agreement was void where made; such an agreement can be enforced nowhere. In Cappel *v.* Weir, 46 Misc. 441, the court held that where the court of the place of performance would apply the law of the place of making, the latter law would be applied in New York. This is however a questionable doctrine.

[4] Wilson *v.* Lewiston Mill Co., 150 N. Y. 314; Shillito *v.* Reineking, 30 Hun 345; Robertson *v.* National S. S. Co., 1 App. Div. 61.

[5] Sheldon *v.* Haxtun, 91 N. Y. 124; Berrien *v.* Wright, 26 Barb. 208; Balme *v.*

the place of contract governs, unless the parties clearly intended it to be governed by that of the place of performance.[1]

North Carolina.

Where there is no place of payment stipulated which is different from the place of making, the law of the latter place governs.[2] Where the two places differ, some cases have applied the law of the place of making;[3] other cases lean to the law of the place of performance;[4] while the law as laid down in the latest case appears to be, that the parties may by agreement adopt the law of any place,[5] so long at least as they do so *bona fide*.[6]

North Dakota.

The place of making and of performance being the same, its law governs the contract.[7] In a case involving the validity of a loan by a Minnesota corporation to a resident of North Dakota the court said that where the parties to a loan reside in different states it is competent for them to contract under the laws of either, and they will be presumed to contract under the law which makes the loan valid.[8]

Wombough, 38 Barb. 352; Bowen *v.* Bradley, 9 Abb. Pr. N. S. 395; Weil *v.* Lange, 6 Daly 549.

[1] Grand *v.* Livingston, 158 N. Y. 688, affirming 4 App. Div. 589; Union Nat. Bank *v.* Chapman, 169 N. Y. 538; Valk *v.* Erie R. R., 130 App. Div. 446. In an earlier case, Ruse *v.* Mutual B. L. I. Co., 23 N. Y. 516, the court presumed that the law of the place of performance was intended to govern.

[2] Grace *v.* Hannah, 6 Jones L. 94; Satterthwaite *v.* Doughty, Busb. 314; Williams *v.* Carr, 80 N. C. 294; Commercial Nat. Bank *v.* Simpson, 90 N. C. 467; Armstrong *v.* Best, 112 N. C. 59; Horton *v.* Home Ins. Co., 122 N. C. 298; Cannaday *v.* Atlantic C. L. R. R., 143 N. C. 439.

[3] Hatcher *v.* McMorine, 4 Dev. L. 122; Taylor *v.* Sharp, 108 N. C. 377. This view was taken in a later case, where damages were asked for failure to deliver a telegram. Hall *v.* Western U. T. Co., 139 N. C. 369.

[4] Morris *v.* Hockaday, 94 N. C. 286; Rowland *v.* Old Dominion Assoc., 115 N. C. 825.

[5] Williams *v.* Neutral R. F. L. Assoc., 145 N. C. 128.

[6] Meroney *v.* Atlanta N. B. & L. Assoc., 112 N. C. 842.

[7] Travelers Ins. Co. *v.* California Ins. Co., 1 N. D. 151.

[8] United States S. & L. Co. *v.* Shain, 8 N. D. 136.

Ohio.

Where a contract is made and payable in the same state it is governed by the law of that state,[1] though the writing was in fact signed elsewhere [2] or the offer sent from another state.[3]

Where the places of making and performance differ, a few decisions in the inferior courts have referred the obligation to the law of the place of making;[4] but the doctrine which has finally been accepted is that the law of the place of performance governs the nature and validity of the obligation,[5] except in the case of usury, where the parties are allowed to accept the provisions of the law of either place,[6] and even, as it was held in one case, of the place where the debtor lived and made his bargain, though the note on which suit was brought was made and performable elsewhere.[7]

Oklahoma.

In the case of a telegraph message sent from the Indian Territory into Oklahoma it was held that the contract was to be governed by the law of the Indian Territory.[8]

Pennsylvania.

If the contract is expressly performable where made,[9] or no place of performance is named, and therefore it is performable where made,[10] it is governed by the law of that place, on the ground that the law of

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[1] Lonsdale *v.* Lafayette Bank, 18 Ohio 126; Lockwood *v.* Mitchell, 7 Ohio St. 387; Plant *v.* Mutual L. I. Co., 26 Ohio C. C. 499.

[2] Smith *v.* Frame, 3 Ohio C. C. 587.

[3] Eureka Ins. Co. *v.* Parks, 1 Cin. Sup. Ct. 574.

[4] Conahan *v.* Smith, 2 Disney 9; Anderson C. D. Bank *v.* Turner-Looker Co., 2 Ohio N. P. 73; Harrison *v.* Baldwin, 5 Ohio C. C. 310.

[5] Pittsburgh C. C. & S. L. Ry. *v.* Sheppard, 56 Ohio St. 68; Montana C. & C. Co. *v.* Cincinnati C. & C. Co., 69 Ohio St. 351; Jaconson *v.* Adams Exp. Co., 1 Ohio C. C. 381; Curtis *v.* Hutchinson, 1 Ohio Dec. (Repr.) 471, 10 West L. J. 134.

[6] Kilgore *v.* Dempsey, 25 Ohio St. 413.

[7] Scott *v.* Perlee, 39 Ohio St. 63.

[8] Weston U. T. Co. *v.* Pratt, 18 Okl. 274.

[9] Jetor *v.* Fellows, 32 Pa. 465; Bennett *v.* Eastern B. & L. Co., 35 Atl. 684; Spearman *v.* Ward, 114 Pa. 634.

[10] Dougherty *v.* Snyder, 15 S. & R. 84; Hardiman *v.* Fire Assoc., 212 Pa. 383; Todd *v.* State Ins. Co., 11 Phila. 355; Watt *v.* Gideon, 22 Pa. Co. Ct. 499.

the place of performance governs.[1] And where the law of the place of making and that of the place of performance differ, the latter governs the obligation,[2] even in the case of a contract of carriage, where the performance begins at the place where the contract is made.[3]

Rhode Island.

Where the contract was made and performable in the same place by its express terms,[4] and where no place of performance is named,[5] the contract has been held, without much discussion, to be governed by the law of that place. And where a note was dated in Rhode Island but delivered as a note in Massachusetts it was said, again without discussion of the point, to be a Massachusetts note and governed by the law of that state.[6] This seems to be an adoption of the law of the place of making as the law necessarily applicable to the contract.

South Carolina.

The law of the place of performance is presumably the law that governs a contract; but if no place of performance is named it is performable at the place of making, and that law therefore governs.[7] But it is possible for the parties to contract with reference to the place of making, and the question whether they did so contract

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[1] Allshouse *v.* Ramsay, 6 Whart. 331; Clark *v.* Searight, 19 Atl. 941; Baum *v.* Birchall, 150 Pa. 164; Brewster *v.* Lyndes, 2 Miles 185. See however Hazelhurst *v.* Kean, 4 Yeates 19.

[2] Bennett *v.* Building & L. Assoc., 177 Pa. 233. The statement of the doctrine seems to rule out the possibility of the parties selecting any other law, even in a usury case. But see Todd *v.* State Ins. Co., 11 Phila. 355, where the right of the parties to choose their law seems to be recognized.

[3] Brown *v.* Camden & A. R. R., 83 Pa. 316; Burnett *v.* Pennsylvania R. R., 176 Pa. 45; Hughes *v.* Pennsylvania R. R., 202 Pa. 222 (explaining Fairchild *v.* Philadelphia W. & B. R. R., 148 Pa. 527, and apparently overruling that case and Brooke *v.* New York L. E. & W. R. R., 108 Pa. 529, where the law of the place of contracting was applied); Merchants' Nat. Bank *v.* Shaw, 2 W. N. C. 542; Trexler *v.* Baltimore & O. R. R., 28 Pa. Super. 207. In Hughes *v.* R. R., *supra*, the court said that in this respect the contract of carriage possibly differed from other contracts.

[4] Leonard *v.* State M. L. A. Co., 27 R. I. 121; *In re* Peckham, 69 Atl. 1002.

[5] Barrett *v.* Dodge, 16 R. I. 740.

[6] Winward *v.* Lincoln, 23 R. I. 476.

[7] Touro *v.* Cassin, 1 Nott & McC. 173; Curnow *v.* Phœnix Ins. Co., 37 S. C. 406; Tillinghast *v.* Boston & P. R. L. Co., 39 S. C. 484; Exchange Bank *v.* McMillan, 76 S. C. 561; Gallettey *v.* Strickland, 74 S. C. 394

may be determined either by their express stipulation [1] or by the circumstances.[2]

South Dakota.

The law of the place of performance is adopted by statute as the law governing a contract; [3] which of course in the case of a contract performable where it is made is the law of that place.[4] In the case of a contract of carriage, however, the law of the place of shipment appears to be adopted for determining the validity of a limitation of liability.[5]

Tennessee.

A contract made and payable in the same place is held to be governed by the law of that place without indicating whether the important circumstance is the making or the performance.[6] But in several cases where the place of payment did not appear the law of the place of making was held to govern; [7] and the same law has been applied in cases where the places of making and of performance were different.[8] In usury cases, however, the court allows the parties to choose the law either of the place of making or of the place of performance,[9] so long as it is done *bona fide*.[10]

Texas.

Where no place of performance appears the contract is to be governed by the law of the place of making.[11] When the making and the performance are in different states, the court in several cases

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[1] Equitable B. & L. Assoc. *v.* Corley, 72 S. C. 404.

[2] Thornton *v.* Dean, 19 S. C. 583.

[3] Barrey *v.* Stover, 20 S. D. 459.

[4] Warner *v.* Citizens' Bank, 6 S. D. 152; First Nat. Bank *v.* Doeden, 21 S. D. 400.

[5] Meuer *v.* Chicago M. & S. P. Ry., 5 S. D. 568.

[6] Trabue *v.* Short, 5 Cold. 293; Lewis *v.* Woodfolk, 2 Baxt. 25; Robinson *v.* Queen, 87 Tenn. 445; Brady *v.* McGehee, 1 Shann. Cas. 154; Carnegie Steel Co. *v.* Chattanooga Const. Co., 38 S. W. 102.

[7] King *v.* Doolittle, 1 Head 77; Smithwick *v.* Anderson, 2 Swan 573; Roberts *v.* Winton, 100 Tenn. 484.

[8] Elliott N. Bank *v.* Western & A. R. R., 2 Lea 676; Gray *v.* Western U. T. Co., 108 Tenn. 39.

[9] Senter *v.* Bowman, 5 Heisk. 14; Overton *v.* Bolton, 9 Heisk. 762; Sharp *v.* Davis, 7 Baxt. 607.

[10] Parham *v.* Pulliam, 5 Coldw. 497.

[11] Shelton *v.* Marshall, 16 Tex. 344; Fidelity M. L. Assoc. *v.* Harris, 94 Tex. 25; Merrielles *v.* Bank, 5 Tex. Civ. App. 483.

(all involving the undertakings of carriers and telegraph companies) has applied the law of the place of making.[1] But the doctrine generally accepted is that the law *bona fide* selected by the parties will govern, which in the absence of evidence of other intent is that of the place of performance,[2] and the parties cannot *bona fide* agree upon any law except that either of the place of making or of the place of performance.[3]

Vermont.

The law of the place of making governs when the obligation is expressly payable there,[4] or where no place of payment is named.[5] Only one case has been found where a place of payment different from the place of making was expressly agreed upon; the maker of the note there in question was a corporation, and the question was, what was the liability of the shareholders. The court said that "though it may be true that the bill itself should be governed by the laws of the place where it is made payable," yet the liability of the stockholders must be determined by the law under which the corporation was formed, which was the place of making.[6]

Virginia.

The law of the place of performance is presumably the law intended by the parties, and the contract will be governed by that law.[7] If the parties expressly agree upon a law and declare that the contract is made with reference to it, effect will be given to their intention.[8]

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[1] Cantu *v.* Bennett, 39 Tex. 303; Western U. T. Co. *v.* Waller, 96 Tex. 589; Missouri P. Ry. *v.* Harris, 1 Tex. App. Civ. Cas. § 1257; Mexican N. R. R. *v.* Ware, 60 S. W. 343; Western U. T. Co. *v.* Cooper, 29 Tex. Civ. App. 591; Western U. T. Co. *v.* Buchanan, 35 Tex. Civ. App. 437; St. Louis S. W. Ry. *v.* McIntyre, 36 Tex. Civ. App. 399.

[2] Bullard *v.* Thompson, 35 Tex. 313; Ryan *v.* Missouri K. & T. Ry., 65 Tex. 13; Seiders *v.* Merchants Life Assoc., 93 Tex. 194; Metropolitan L. I. Co. *v.* Bradley, 98 Tex. 230, affirming 79 S. W. 367; Western U. T. Co. *v.* Blake, 29 Tex. Civ. App. 224.

[3] Connor *v.* Donnell, 55 Tex. 167; Dugan *v.* Lewis, 79 Tex. 246.

[4] Harrison *v.* Edwards, 12 Vt. 648; Emerson *v.* Patridge, 27 Vt. 8.

[5] Russell *v.* Buck, 14 Vt. 147; Adams *v.* Gay, 19 Vt. 358; Hartford S. B. I. & I. Co. *v.* Lasher S. Co., 66 Vt. 439; Baker *v.* Spaulding, 71 Vt. 169.

[6] Cutler *v.* Thomas, 25 Vt. 73.

[7] Manhattan L. I. Co. *v.* Warwick, 20 Gratt. 614; National M. B. & L. Assoc. *v.* Ashworth, 91 Va. 706; Nickels *v.* People's Assoc., 93 Va. 380; Ware *v.* Bankers' Co., 95 Va. 680; Middle S. L. B. & C. Co. *v.* Miller, 104 Va. 464.

[8] Union C. L. I. Co. *v.* Pollard, 94 Va. 146.

Washington.

While a contract is ordinarily governed by the law of the place where it is made and performable,[1] it is within the power of the parties by their express agreement to establish the place under whose laws it shall be construed.[2]

West Virginia.

Where a contract is not expressly performable elsewhere it is governed by the law of the place of contract;[3] and even where expressly payable elsewhere the law of the place of making is applied.[4]

Wisconsin.

Contracts performable where they are made are governed by the law of the place of making.[5] But where a contract is made payable in another place, the law of the place of payment ordinarily governs, as the law presumably intended by the parties;[6] though their intention to be governed by the law of the place of making may be shown by the circumstances, and will then be applied.[7] Where, however, the contract is performable partly at the place of making and partly elsewhere, the presumption favors the law of the place of making.[8]

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[1] Wood *v.* Cascade F. & M. I. Co., 8 Wash. 427; Bank *v.* Doherty, 42 Wash. 317.

[2] Griesemer *v.* Mutual L. I. Co., 10 Wash. 202.

[3] Nichols *v.* Porter, 2 W. Va. 13; Klinck *v.* Price, 4 W. Va. 4; Pugh *v.* Cameron, 11 W. Va. 523; Shipman *v.* Bailey, 20 W. Va. 140; Galloway *v.* Standard F. I. Co., 45 W. Va. 237.

[4] Floyd *v.* National L. & I. Co., 49 W. Va. 327; Miller *v.* Prudential B. & T. Co., 63 W. Va. 107. In both these cases the law applied was a statute of the place of making which regulated the doing of business.

[5] Kennedy *v.* Knight, 21 Wis. 340; Central Trust Co. *v.* Burton, 74 Wis. 329; Maynard *v.* Hall, 92 Wis. 565; Second Nat. Bank *v.* Smith, 118 Wis. 18.

[6] Shores Lumber Co. *v.* Stitt, 102 Wis. 450; Bartlett *v.* Collins, 109 Wis. 477; Brown *v.* Gates, 120 Wis. 349. In Seamans *v.* Knapp-Stout & Co., 89 Wis. 171, the law of the place of making was said to govern the contract; following and quoting Scudder *v.* Union Bank, 91 U. S. 406. But the case was disapproved in Brown *v.* Gates, *supra.*

[7] Fisher *v.* Otis, 3 Chand. 83, 3 Pin. 78; Newman *v.* Kershaw, 10 Wis. 333. In Brown *v.* Gates, 120 Wis. 349, the fact that the law of the place of performance made the contract void, while that of the place of making made it valid, was held not of itself a circumstance sufficient to overcome the presumption.

[8] Davis *v.* Chicago M. & S. P. R. R., 93 Wis. 470; Bartlett *v.* Collins, 109 Wis. 477.

Summary.

It is not easy to deduce from these confused and conflicting decisions any satisfactory conclusion as to the rule or rules favored by authority. A few things may, however, be pointed out.

First, it is to be noticed that courts who are uttering their instinctive views, the expression of their general knowledge of legal principle uninfluenced by authority, invariably speak of the law of the place of contracting as the law that governs. So strong is this feeling, that the form of statement of a different rule often shows its influence. Thus Story, holding the view that the law of the place of performance governs, nevertheless states it as an exceptional rule: as a general principle the law of the place of making governs, but there is an exception where the contract is to be elsewhere performed. To the instinctive acceptance of this general principle we must also refer the curious notion that the place of contracting may mean either the place of making or the place of performance of the contract, thus bringing the rule which applies the law of the place of performance within the general principle that the *lex loci contractus* governs.

A second point to be noticed is that the adoption of any other rule than that of the place of making is to be referred definitely to the authority of one man. The rule that the intention of the parties shall govern, either laid down in this simple form or coupled with some legal presumption as to the intention, may be directly traced back, through the early American cases or the English cases, to the *dictum* of Lord Mansfield in Robinson *v.* Bland,[1] and, as has been seen, was derived by him from the doctrines of the civil law. The other rule, that the law of the place of performance governs, may be traced directly to the statement of Story in his Conflict of Laws,[2] often repeated verbatim in the cases; and it was on his part a restatement of an opinion he expressed in the case of Reimsdyk *v.* Kane.[3] It appears to have been based on some of the language in Robinson *v.* Bland,[1] on which he put an interpretation differing from that ordinarily adopted. The statement in that case that the law of England, the place of performance, governed as the law intended by

[1] 2 Burr. 1077.
[2] Sec. 280.
[3] 1 Gall. 371, 375.

the parties to govern has thus formed the basis for two rules: one, that the law intended by the parties governed, it being in that case merely an accidental circumstance that the law of the place of performance was intended; the other, that the law of the place of performance always governs, the reason given being that in the view of the law parties always intend their contract to be governed by the law of the place of performance.

Finally, the present tendency, greatly stimulated by the late English and Federal cases, is toward the adoption of the law intended by the parties. Though the greater number of states still profess adherence to Judge Story's rule, it is being superseded by the other; and ultimately the American jurisdictions will divide in their adherence between the law of the place of making and the law intended by the parties.

It may be worth while, before leaving this part of the subject, to enumerate the states which apparently accept one or another of the principal rules. It must be pointed out that in several states the question appears not to have arisen; in others, the decisions or *dicta* are not sufficiently clear to justify including the state in either list. So far as one can determine the prevailing rule, the grouping seems to be as follows:

States adopting the law of the place of making: Colorado, Indiana, Maryland (?), Massachusetts, Tennessee, West Virginia.

States adopting the law of the place of performance: Alabama, Arkansas (?), California (?), Georgia, Iowa, Kansas, Kentucky, Louisiana (?), Maine (?), Mississippi, Michigan, New Hampshire (?), New Jersey, Ohio, Pennsylvania, South Dakota.

States adopting the law intended by the parties: England and the English colonies, Connecticut,[1] District of Columbia, Illinois, Nebraska, New York, North Carolina, North Dakota, South Carolina,[1] Texas,[1] Virginia,[1] Washington, Wisconsin; and, in usury cases, also the Federal courts, Alabama, Georgia, Kansas, Missouri, Mississippi, Ohio, and Tennessee.

In making any such classification of jurisdictions it is impossible to feel confident of one's accuracy. The failure of the courts in most cases to realize that the various rules represent conflicting doctrines and not mere differences in forms of statement has often led courts to apply different rules in successive cases without meaning to

[1] Presumably, in these States, the law of the place of performance.

depart from precedent; and the confusion between intended interpretation and intended obligation, between presumption of law and presumption of fact, and between execution of a promise and execution (by performance) of an obligation have led to a deep-seated confusion as to applicable law. But the classification made is submitted as on the whole probably not far from correct.

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[*To be continued*]